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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

CHRISTOPHER DRAYTON AND CLIFTON BROWN, JR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether an officer who informs a passenger on a bus that the officer is conducting drug and illegal weapons interdiction and asks the passenger for consent to search, while another officer stays at the front of the bus without blocking the exit, has effected a "seizure" of that passenger within the meaning of the Fourth Amendment and *Florida* v. *Bostick*, 501 U.S. 429 (1991).

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The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 231 F.3d 787. The oral decision of the district court (App., *infra*, 10a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2000. A petition for rehearing was denied on May 16, 2001. App., *infra*, 15a-16a. By letters dated August 1 and 31, 2001, Justice Kennedy extended the

time within which to file the petition for a writ of certiorari to and including October 12, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution of the United States provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * .

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, respondent Christopher Drayton was convicted of conspiring to distribute cocaine, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Following the entry of a conditional guilty plea in the same court, respondent Clayton Brown was convicted of the same offenses. Drayton was sentenced to 120 months of imprisonment to be followed by eight years of supervised release; Brown was sentenced to 88 months of imprisonment to be followed by five years of supervised release. The Court of Appeals for the Eleventh Circuit reversed and remanded with instructions that the district court grant respondents' motions to suppress. App., *infra*, 1a-9a.

1. On February 4, 1999, respondents were passengers on a Greyhound bus from Ft. Lauderdale, Florida, to Detroit, Michigan, when that bus made a scheduled stop at a Greyhound bus station in downtown Tallahassee, Florida. During the stop, all 25 to 30 passengers on board were required to get off the bus for reasons unrelated to law enforcement. After the passengers reboarded, three members of the Tallahassee Police Department asked the driver for permission to board the bus. The driver gave them permission, and left the bus to complete necessary paperwork in the terminal office. The police officers were dressed casually, and each had his badge around his neck or in his hand. The officers' weapons were carried in side-holsters that were covered by their clothing, and there is no evidence that any passenger ever saw that the officers were armed. App., *infra*, 2a-3a.

After boarding the bus, Officers Lang and Blackburn made their way to the back, "while Officer Hoover knelt in the bus driver's seat, facing toward the rear in order to observe the passengers and ensure the safety of the other officers." App., *infra*, 3a. Officers Lang and Blackburn began to move forward, asking passengers about their travel plans and trying to match passengers with the luggage in the overhead racks. To avoid blocking the aisle, the officers stood next to or behind the passengers with whom they were talking. *Ibid.*

Drayton was seated on the driver's side of the bus, a few rows forward of the rear, in the aisle seat, and Brown was seated next to him. Officer Lang approached them from the rear and leaned over Drayton's right shoulder. He showed them his badge and, with his face approximately 12-18 inches away from Drayton's, spoke to respondents in a voice just loud enough for respondents to hear. App., *infra*, 4a. See also 3/16/99 Tr. 19, 26. He stated: "I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?" Respondents answered by pointing to a green bag in the overhead rack. Officer

Lang then asked, "[d]o you mind if I check it?," to which Brown responded, "[g]o ahead." Lang handed the bag to Officer Blackburn, who checked it and found no contraband. App., *infra*, 4a.

During that interaction, Officer Lang noticed that respondents were wearing heavy jackets and baggy pants, even though it was a warm day. App., *infra*, 4a-5a. Smugglers, he was aware, often used baggy clothing "to conceal weapons or narcotics on their person." 3/16/99 Tr. 30. Lang therefore asked for and received permission from Brown to pat him down for weapons. During the patdown, Lang touched hard objects on Brown's thighs that resembled drug packages he had detected on other occasions. He arrested Brown and handcuffed him, and Officer Hoover escorted Brown off the bus. App., *infra*, 5a. Officer Lang next turned to Drayton and asked, "[m]ind if I check you?" Drayton responded by lifting his hands approximately eight inches off his legs. Officer Lang conducted a similar patdown and detected the same kind of hard objects on Drayton's thighs. Drayton was then arrested and escorted off the bus. A later search of respondents revealed that Drayton had 295 grams of cocaine powder taped to the multiple pairs of boxer shorts he was wearing, and that Brown had 483 grams of cocaine powder taped to his multiple pairs of boxer shorts as well. App., *infra*, 5a.

2. A federal grand jury returned a two-count indictment charging respondents with conspiring to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) and 846, and possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Gov't C.A. E.R. 12 (indictment). Respondents moved to suppress the cocaine. Relying on two Eleventh Circuit decisions that involved bus interdictions, *United States* v. *Guapi*, 144 F.3d 1393 (1998), and *United States* v. *Washington*, 151 F.3d 1354 (1998), respondents argued that their consent to Officer Lang's request to search their persons was not "voluntary" because they "were not told they did not have to consent" or that they were free to leave the bus. See, *e.g.*, Drayton C.A. E.R., Tab 22, at 2.

Following an evidentiary hearing and the arguments of counsel, the district court denied the motion. "[T]he police conduct," the district court concluded, "was not coercive and * * * the search was therefore voluntary." App., *infra*, 10a (3/16/99 Tr. 104). The two Eleventh Circuit cases relied upon by respondents, the court further held, were distinguishable. In those cases, the court explained, the officers made a general announcement from the front of the bus that might have suggested that the passengers were not free to leave the bus or that they were not permitted to refuse cooperation. Here, in contrast, "[t]here was no general announcement" when the officers got on the bus, "[t]here was nothing coercive," and nothing Officer Lang said or did "would suggest to a reasonable person that they were not free to leave." *Id.* at 14a (3/16/99 Tr. 107-108). Although the officers did not "tell [respondents] that they don't have to consent," the court noted, "there's nothing in the law that says they have to do that." *Id.* at 13a, 14a (3/16/99 Tr. 106).

3. The court of appeals reversed. App., *infra*, 1a-9a. "This case," the court stated, "is controlled by our decision in *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998), which extended *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998)." App., *infra*, 5a-6a. In *Guapi*, two officers had boarded the bus at a scheduled stop, and one of them made a general announcement to all passengers that he wanted to check on-board lug-

gage for drugs and contraband. He and his partner then waited for passengers to open their bags, at which time one of them proceeded down the aisle of the bus, starting at the front, inspecting each bag. Holding that a Fourth Amendment seizure had occurred, the court of appeals explained that the officer's general announcement effectively meant that "the attention and cooperation of all passengers [was] required." 144 F.3d at 1396. The court reasoned that the coercive effect of such an announcement was qualitatively different from a one-on-one interaction. It is not unusual for one passenger to approach another, the court explained, and "there is no reason to believe that when police officers engage in similar behavior that they are coercing or intimidating citizens." *Ibid.* The court also thought it significant that the officer, "[i]nstead of beginning his search in the rear of the bus, which would have permitted those passengers who felt uncomfortable * * * to exit without confronting the police," had "stood in front of each passenger" and thereby "blocked the aisle." *Ibid.* While declining to impose a "per se rule requiring bus passengers to be informed of their constitutional rights," the court found that the announcement, the blocking of the aisle, and the failure to advise passengers that they had the right to refuse the request for consent, effectuated a seizure because a reasonable person would not have felt free to refuse to cooperate. *Ibid.*

In *Washington*, the court of appeals again concluded that a defendant's consent to the search of his luggage on a bus was invalid because of the general announcement at the front of the bus and the officers' failure to advise the passengers that they had the right to refuse to consent. 151 F.3d at 1356. The officer, the court explained, had "held his badge above his head and identified himself as a federal agent." *Id.* at 1357. "He

announced what he wanted the passengers to do, and what he was going to do." *Ibid.* Under those circumstances, and "[a]bsent some positive indication that [the passengers] were free not to cooperate," the court found it "doubtful a passenger would think he or she had the choice to ignore the police presence." *Ibid.* Judge Black dissented in *Washington*. The majority, she explained, had in effect established a "per se rule" that officers must explicitly advise bus passengers of their right to refuse to consent before consent will be deemed voluntary. *Id.* at 1357-1358. That result, she contended, "conflicts" with this Court's "consistent[] reject[ion] [of] per se rules in the Fourth Amendment context." *Ibid.* (citing *Florida* v. *Bostick*, 501 U.S. 429 (1991), and *Ohio* v. *Robinette*, 519 U.S. 33 (1996)).

In this case, the court of appeals concluded that, although Officers Lang, Blackburn, and Hoover had neither blocked the aisle nor communicated that cooperation was required through a general announcement, *Guapi* and *Washington* compelled the conclusion that respondents had been seized. Like the officers in *Guapi* and *Washington*, the court stated, Officer Lang in this case began the encounter with a "show of authority" by displaying his badge in his hand and stating that he was conducting an interdiction. App., *infra*, 6a. The fact that the officer spoke to each passenger individually in a quiet tone, the court stated, made no difference: "We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one." App., *infra*, 7a.

The court also refused to distinguish this case from *Washington* and *Guapi* based on the fact that, in this case, the officer did not ask respondents for tickets or identification. App., *infra*, 7a. Whether or not an officer asks for such documents, the court stated, does

not affect whether other requests or commands are coercive. *Ibid.* Nor did it matter that passengers had in other instances declined to have their luggage searched or had exited the bus, the court stated. *Id.* at 8a. There was no evidence of what was said in those other cases, the court noted, and the number of times in which passengers had left the bus were few in comparison to the number of bus interdictions. *Ibid.* Finally, the court concluded that the presence of an officer in the bus driver's seat, at the front of the bus, contributed to the finding that the passengers had been seized. Seeing an officer stationed near the bus exit, the court stated, "might make a reasonable person feel less free to leave the bus." *Id.* at 9a.

The court of appeals acknowledged that *Washington* "has been criticized by the Tenth Circuit" for establishing a de facto requirement that officers warn bus passengers of their right to refuse cooperation. App., *infra*, 2a n.2 (discussing *United States* v. *Broomfield*, 201 F.3d 1270 (10th Cir.), cert. denied, 531 U.S. 830 (2000)). The court also acknowledged that the Tenth Circuit had, for that reason, "declined to follow" *Washington*. *Ibid.* Nevertheless, the court deemed itself bound by *Washington* as in-circuit precedent. *Ibid.* The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 15a-16a.

REASONS FOR GRANTING THE PETITION

The court of appeals held that respondents, passengers on a Greyhound bus, were unlawfully seized and that their consent to search was invalid, when an officer spoke to them individually in a quiet voice, did not point weapons or make intimidating movements, left the aisle free for passage, and used no words that would suggest that respondents were required to cooperate or could

not leave the bus. The court of appeals concluded that a seizure had occurred because the officer, at the beginning of the conversation, identified himself as a police officer, and because another officer was kneeling in the bus driver's seat where he could be seen by the passengers. That result cannot be reconciled with this Court's cases, including *Florida* v. *Bostick*, 501 U.S. 429 (1991), and *INS* v. *Delgado*, 466 U.S. 210 (1984). It effectively establishes a per se requirement that law enforcement officers seeking to speak to passengers on a bus must give *Miranda*-like warnings first, advising passengers of their right to refuse consent or terminate the encounter. And it deepens a disagreement among the courts of appeals that has arisen in the wake of *Bostick*. The question of when a police-citizen encounter on a bus or other means of public transportation becomes a "seizure" within the meaning of the Fourth Amendment is important and recurring, because interviews such as those that occurred in this case are a significant law enforcement tool to prevent crime and protect the public on those facilities. Accordingly, this Court's review is warranted.

A. The Court of Appeals' Decision Departs From This Court's Precedents On When A Police-Citizen Interaction Is Consensual

1. The Fourth Amendment protects against unreasonable "seizures." U.S. Const. Amend. IV. This Court has repeatedly addressed whether, and under what circumstances, a police-citizen encounter rises to the level of a Fourth Amendment "seizure." In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court held that a "seizure" occurs "[o]nly when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *Id.* at 19 n.16; see *California* v.

Hodari D., 499 U.S. 621, 625-626 (1991). As long as a reasonable person would feel free "to disregard the police and go about his business," *Hodari D.*, 499 U.S. at 628, the encounter is purely consensual and beyond the reach of the Fourth Amendment. This Court has routinely applied that principle in a variety of settings to conclude that law enforcement officers may approach individuals whom they have no reason to suspect of wrongdoing and ask them questions, *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984) (per curiam); ask to examine their identification, *United States* v. *Mendenhall*, 446 U.S. 544, 557-558 (1980); and request consent to search their luggage, *Florida* v. *Royer*, 460 U.S. 491, 501 (1983) (plurality opinion).

In *Bostick*, *supra*, this Court considered the application of that principle in the context of bus interdiction efforts. Federal, state, and local law enforcement authorities often station police officers at "airports, train stations, and bus depots," and "[l]aw enforcement officers stationed at such locations routinely approach individuals, either randomly or because they suspect in some vague way that the individuals may be engaged in criminal activity, and ask them * * * questions"; sometimes, they also ask for consent to perform searches. *Bostick*, 501 U.S. at 431. *Bostick* itself concerned the Broward County Sheriff's Department's practice of boarding buses at scheduled stops and asking passengers for permission to search their luggage for narcotics. The Florida Supreme Court had adopted a per se rule that all police-citizen encounters occurring in the "cramped confines" of a bus are impermissible suspicionless seizures, and that any passenger's consent to a search of the passenger's possessions in that context is automatically involuntary. Reversing that decision, this Court emphasized two

central points. First, the determination of whether a seizure occurs must be based on a "consider[ation] [of] all the circumstances surrounding the encounter," rather than bright-line rules. 501 U.S. at 439. The location of the questioning—the "cramped confines of a bus"—is a permissible, but not a dispositive, factor in this calculus. *Id.* at 435. Second, the Court reiterated that, "[s]ince *Terry*, we have held repeatedly that mere police questioning does not constitute a seizure," 501 U.S. at 434, and that "law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, [or] by putting questions to him if the person is willing to listen." *Ibid.* (quoting *Royer*, 460 U.S. at 497).

The court of appeals' decision in this case represents a marked deviation from this Court's teachings. The court of appeals held that its earlier decisions in *United States* v. *Guapi*, 144 F.3d 1393 (11th Cir. 1998), and *United States* v. *Washington*, 151 F.3d 1354 (11th Cir. 1998), "compelled" the conclusion that the one-on-one police-citizen encounter in this case constituted a Fourth Amendment seizure. That determination, however, contravened "a long, unbroken line of decisions dating back more than [30] years" that allows "police officers [to] approach individuals as to whom they have no reasonable suspicion and ask them potentially incriminating questions" without effectuating a seizure. *Bostick*, 501 U.S. at 439. *Bostick* expressly refused to carve out an exception for encounters that occur on a bus simply by virtue of the location of the encounter. The principle that officers may engage citizens in consensual conversations without effectuating a seizure, the Court held, "applies equally to encounters on a bus." *Id.* at 439-440.

The court of appeals' decision in this case effectively converts almost all police-citizen interactions on a bus into seizures, *unless* the police specifically warn the passenger that he has the right to refuse cooperation. In finding a seizure, the court of appeals principally relied on the fact that Officer Lang began the encounter by identifying himself as a police officer and explaining that he was conducting drug and weapons interdiction. Such conduct, the court explained, constitutes a "show of authority" like the general announcements from the front of the bus that were found to be coercive in *Washington* and *Guapi*. App., *infra*, 6a-7a. An officer's introduction of himself and announcement of his law-enforcement mission, however, is not by itself a sufficient basis for finding a seizure, even when that occurs on a bus. A seizure occurs only if an officer *invokes* his legal authority by issuing commands or otherwise communicating to the citizen that he is not free to go or to decline cooperation, and thereby restrains the citizen's liberty. See, *e.g.*, *United States* v. *Alarcon-Gonzalez*, 73 F.3d 289 (10th Cir. 1996) (order to "freeze"). *Bostick* makes that clear. The Court stated there that the police may not "demand of passengers their 'voluntary' cooperation" through "an '*intimidating* show of authority,'" such as pointing their weapons at citizens or otherwise engaging in misconduct that might overbear the passengers' will. 501 U.S. at 438. But merely identifying oneself and showing a badge, so that the citizen understands that he is communicating with the police rather than a random stranger, does not constitute coercion.

Before the decision in this case, the Eleventh Circuit specifically distinguished between one-on-one interactions on a bus, on the one hand, and general announcements made by the police over a loudspeaker

from or at the front of the bus, on the other. General announcements, the court explained, might create an element of coercion that one-on-one encounters do not. See *Guapi*, 144 F.3d at 1396. In this case, however, the court of appeals dismissed that distinction as *dictum* and treated *every* police-citizen interaction on a bus that begins with the officer identifying himself as inherently coercive. App., *infra*, 7a & n.5. Introducing oneself as a police officer to individual passengers, the court stated, is no "less coercive than a general bus-wide" announcement. *Id.* at 7a.

The suggestion that the police necessarily intimidate citizens when they identify themselves as police in one-on-one interactions is contrary to this Court's precedents, which have repeatedly found such interactions to be consensual. In *Florida* v. *Rodriguez*, 469 U.S. 1, 4-6 (1984) (per curiam), for example, the Court stated that an encounter in which the officer "showed his badge and asked respondent if [he] might" step aside and talk with him and another officer was "clearly the sort of consensual encounter that implicates no Fourth Amendment interest." And in *INS* v. *Delgado*, 466 U.S. 210 (1984), INS agents wearing badges and carrying firearms moved through a private factory, identified themselves as they approached individual employees, and asked those employees questions. *Id.* at 212, 217-221. This Court concluded that the agents' conduct did not effectuate a seizure, because it did not create "circumstances * * * so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave" unless he cooperated. *Id.* at 216. The same is true here. There was nothing about Officer Lang's introduction of himself and explanation of his purpose that would have created such intimidation as to lead reasonable people to believe that they could

neither refuse cooperation nor leave. As the district court found, "everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it." App., *infra*, 13a (3/16/99 Tr. 107).

The other factor relied on by the court of appeals—the presence of a single officer in the bus driver's seat, near the exit, looking backward to ensure officer safety, App., *infra*, 3a, 9a—similarly cannot support the finding of a seizure. There were multiple officers stationed near the exits of the factory in *Delgado*, yet this Court expressly rejected the suggestion that their presence converted the otherwise consensual interactions within the factory into seizures. 466 U.S. at 217-218. The plaintiffs there claimed "that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving." *Id.* at 218. Rejecting that claim, the Court explained that "there is nothing in the record indicating that this is what the agents at the doors actually did." *Ibid.* Indeed, the Court continued, "[t]he obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned." *Ibid.* Thus, the Court concluded, "[t]he presence of agents by exits posed no reasonable threat of detention to" the factory workers and "the mere possibility that they would be questioned if they sought to leave * * * should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." *Id.* at 219. The court of appeals offered no reason why *Delgado*'s analysis does not apply with equal force here.

2. The court of appeals' decision also contravenes this Court's precedents by effectively establishing a per

se requirement that, for an encounter on a bus to be found consensual, officers must afford passengers *Miranda*-like warnings of their right to refuse cooperation. In *Washington*, for example, the court declared that cooperation would not be found voluntary absent "some positive indication that consent could be refused." 151 F.3d at 1357. Indeed, for that reason, Judge Black dissented in *Washington*, criticizing the decision as establishing a de facto "per se rule" that officers must explicitly advise passengers that they have the right to refuse consent. *Id.* at 1357-1358.

Before the decision in this case, it was possible to disagree with Judge Black's reading of Eleventh Circuit case law. The Eleventh Circuit had disavowed any intention of creating a per se warning requirement in *Washington* and *Guapi*. See *Guapi*, 144 F.3d at 1395 (acknowledging that the Court "has steadfastly rejected the notion of imposing *per se* rules" in this context and had "specifically rejected the notion that police officers must always inform citizens of their right to refuse when seeking permission to conduct a warrantless consent search"); *Washington*, 151 F.3d at 1357 (the "Supreme Court has steadfastly rejected the notion of imposing *per se* rules."). The decisions, moreover, could be read as restricting the warning requirement to those situations in which police conduct, such as announcements made from the front of the bus or blocking the aisle, might otherwise be thought coercive. *Guapi*, 144 F.3d at 1395; *Washington*, 151 F.3d at 1357. The decision in this case, however, renders that reading of Eleventh Circuit precedent untenable. Heeding the guidance of *Washington* and *Guapi*, the officers in this case made no statement from the front of the bus, coercive or otherwise. They were careful to avoid blocking the aisle. And they ensured

that nothing they said to the individual passengers communicated the message that cooperation was required. See App., *infra*, 3a (noting officer's quiet tone); *id.* at 14a (3/16/99 Tr. 107-108) ("There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that they were not free to leave."). Nonetheless, the court of appeals concluded that a reasonable person still "would not have felt free to disregard [the officer's] requests without some positive indication that consent could have been refused." App., *infra*, 6a. If consent to search under these circumstances is necessarily the product of "coercion" absent a specific warning of the right to refuse consent, it is difficult to see when officers could ever avoid giving such warnings to bus passengers.

That result cannot be reconciled with this Court's cases. As this Court has explained, express knowledge of the right to refuse consent is not a prerequisite to a valid consent, and officers need not advise individuals of their Fourth Amendment rights. See, *e.g.*, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973) ("[W]hile the subject's knowledge of a right to refuse [to consent] is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."); *id.* at 231 (an advice-of-rights requirement "has been almost universally repudiated by both federal and state courts, and, we think, rightly so."); accord *United States* v. *Watson*, 423 U.S. 411, 424-425 (1976); *United States* v. *Matlock*, 415 U.S. 164, 167 n.2 (1974); see also *Mendenhall*, 446 U.S. at 555 ("Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry,

for the voluntariness of her responses does not depend upon her having been so informed.").

While the officer in *Bostick* did advise passengers of their right to refuse consent, the agents in *INS* v. *Delgado*, *supra*, gave no such warnings, even though the factory workers in that case were questioned in the limited confines of the workplace, with armed government agents posted near the exits. Yet this Court concluded that the questioning did not effectuate a seizure. Similarly, in *Ohio* v. *Robinette*, 519 U.S. 33 (1996), this Court rejected the Ohio Supreme Court's holding that the Fourth Amendment required a police officer to advise a person, who had been lawfully detained for a traffic stop, that he was "free to go" before his consent to the officer's request to search his car could be recognized as voluntary. In so holding, the Court emphasized that "we have consistently eschewed bright-line rules" in the Fourth Amendment context, and explained that *Schneckloth* had "previously rejected a per se rule very similar" to the one adopted by the state supreme court in that case. 519 U.S. at 39. The per se warning requirement effectively imposed by the decision below cannot be reconciled with those precedents.

B. The Court of Appeals' Holding Reflects A Significant Disagreement In the Courts Of Appeals Concerning The Legality of Police-Citizen Interactions On Buses

The decision of the court of appeals establishes a conflict among the circuits on a recurring question of increasing importance. Two other courts of appeals have considered the court of appeals' underlying decisions in *Washington* and *Guapi*, which were deemed controlling in this case, and they have reached dia-

metrically opposite conclusions. In *United States* v. *Broomfield*, 201 F.3d 1270, 1275, cert. denied, 531 U.S. 830 (2000), the Tenth Circuit rejected the analysis of *Washington*. In contrast, in *United States* v. *Stephens*, 206 F.3d 914, 918 (2000), the Ninth Circuit endorsed it.

In *Broomfield*, a DEA agent boarded a bus during a scheduled stop and proceeded to the rear of the bus, where he "identified himself to [the defendant] both verbally and by showing his badge." 201 F.3d at 1272, 1275. After agreeing to speak with the agent, the defendant eventually consented to the agent's request to search his gym bag, and the agent uncovered cocaine base. Even though the agent in that case, like the officer in this one, "displayed his badge and did not inform [the defendant] of the right to refuse consent," the court found it dispositive that he, like the officer here, "spoke * * * in an even tone * * * and made no coercive or threatening gestures or comments." *Id.* at 1275. See pp. 3-4, 14, *supra* (Officer Lang spoke politely, in a voice just loud enough to be heard, and there was no evidence that any passenger could tell that the officers were armed). There was "no evidence," the Tenth Circuit concluded, that the agent had "conveyed the message that compliance with his requests was required." 201 F.3d at 1275. Precisely the same is true here. The Eleventh Circuit nonetheless held that the one-on-one encounter between Officer Lang and respondents was coercive and rendered respondents' consent involuntary.

In *Broomfield*, there was no officer at the front of the bus, while in this case there was. As this Court explained in *Delgado*, however, "[t]he presence of agents by exits pose[s] no reasonable threat of detention to" citizens and "the mere possibility that they would be questioned if they sought to leave * * * should not

have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way." 466 U.S. at 219. In any event, the officer's position in *Broomfield* was, if anything, *more* prone to produce coercion than the positions of the officers in this case, because the officer in *Broomfield* partially obstructed the defendant's ability to exit the bus. See 201 F.3d at 1275. But the Tenth Circuit found that consideration insufficient to show that the officer sent a message to passengers that compliance with his requests was required. *Ibid.*

The courts of appeals have expressly recognized the conflict between the Tenth and Eleventh Circuits in bus interdiction cases. In *Broomfield*, the Tenth Circuit specifically refused to follow the Eleventh Circuit's cases. The "soundness of the *Washington* opinion," the Tenth Circuit explained, is "questionable" because it effectively "creat[es] a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent." 201 F.3d at 1275. The court further observed that, "[s]hort of telling the passengers of the right to refuse consent, it is difficult to conceive of any actions the[] officers could have taken to make th[e] search any more reasonable." *Ibid.* (quoting *Washington*, 151 F.3d at 1358 (Black, J., dissenting)). The Eleventh Circuit has also acknowledged the express disagreement between the circuits, noting in this case that *Washington* "has been criticized by the Tenth Circuit, which has declined to follow it." App., *infra*, 2a n.2. Yet the court declined to make any effort to reconcile the decisions.[1]

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[1] The petition for a writ of certiorari in *Broomfield* alleged a conflict between the decision there and the Eleventh Circuit's

While the Tenth Circuit has rejected *Washington* and its progeny, the Ninth Circuit has embraced them. Two months after *Broomfield* was decided, the Ninth Circuit followed *Washington* in *United States* v. *Stephens*, *supra*. There, the Ninth Circuit concluded that three officers had seized the passengers on a bus when they boarded the bus and announced, from the front, that "[n]o one is under arrest, and you are free to leave. However, we would like to talk to you." 206 F.3d at 917. In finding a seizure, the court relied on the purported Hobson's choice created by the announcement—either stay on the bus and consent, or get off the bus and risk drawing attention to yourself—and the officer's failure to advise the passengers of the option of staying on the bus but declining to consent. *Ibid.* Judge Sneed dissented, and Judge O'Scannlain, joined by Judges T.G. Nelson and Kleinfeld, dissented from the court's order denying rehearing banc. They noted the conflict between the Tenth and Eleventh Circuits, and expressed their view that the Ninth Circuit had placed itself on the wrong side of the debate. The majority opinion in *Stephens*, they explained, had

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decisions in *Guapi* and *Washington*. The government opposed the petition on the ground that the cases were factually distinguishable in several respects, one of which was that *Broomfield* involved a one-on-one encounter, whereas *Guapi* and *Washington* involved general announcements. See U.S. Br. in Opp. at 10-13, No. 99-9188. The government likewise opposed the petition for a writ of certiorari in another Tenth Circuit case, *United States* v. *Hill*, 199 F.3d 1143 (1999), cert. denied, 531 U.S. 830 (2000), which also cited *Guapi* and *Washington*, on the ground that the cases were too factually dissimilar to pose a square conflict. U.S. Br. in Opp. at 14-18, No. 99-9245. The court of appeals' decision in this case, which involves a one-on-one encounter, has eliminated any basis for meaningfully distinguishing *Broomfield*. Consequently, this Court's review is now warranted.

"create[d] a per se rule" like the one created by the Eleventh Circuit in *Washington*. *United States* v. *Stephens*, 232 F.3d 746, 747 (9th Cir. 2000) (dissent from denial of rehearing en banc). The imposition of that requirement, they added, is "precisely contrary to Supreme Court precedent," including *Bostick* and *Schneckloth*. *Ibid.* Declaring that "*Washington* is of dubious validity at best," the dissenters concluded that the panel's decision to follow it rather than *Broomfield* "foment[s] a circuit split over an issue that the Supreme Court has already resolved." *Id.* at 748.

Indeed, the Eleventh Circuit's holding here conflicts with pre-*Bostick* circuit precedent as well. In *United States* v. *Flowers*, 912 F.2d 707 (1990), cert. denied, 501 U.S. 1253 (1991), the Fourth Circuit held that encounters like the one in this case do not effect seizures. In that case, like this one, multiple officers boarded a bus to interdict guns and drugs. There, as here, they spoke to the bus passenger "in a casual tone of voice," did "not block the aisle," and did not "display[] weapons or restrain[] [the passenger] in any way." *Id.* at 711. Under the circumstances, the Fourth Circuit concluded that no seizure had occurred. *Id.* at 709, 712. "Nothing about the officers' conduct here impaired [the passenger's] right to refuse to talk to them or to leave the bus." *Id.* at 709. There is no principled basis for distinguishing this case from *Flowers*. The only difference between the two cases is the circuit in which they arose. The division in circuit authority warrants this Court's review.

C. The Court's Guidance Is Required To Clarify The Boundaries of Lawful Police Conduct In Interdiction Programs

The Fourth Amendment issue in this case is significant and recurring.[2] While this Court resolved one issue in *Bostick*, the conflicting appellate decisions discussed above have left law enforcement officers at the federal, state, and local levels without clear guidance on the boundaries of lawful bus, train, and airplane interdiction practices. The court of appeals' decision, moreover, has exacted—and will continue to exact—significant social costs by requiring the suppression of reliable and probative evidence and by preventing officers from engaging in otherwise consensual encounters with citizens.

Programs that rely on consensual interactions between police officers and citizens on means of public transportation are an important part of the national effort to combat the flow of illegal narcotics and weapons. In the current environment, they may also become an important part of preventing other forms of criminal activity that involve travel on the nation's system of public transportation. The court of appeals'

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[2] This issue has arisen repeatedly not only in the published decisions cited in text, but in numerous unpublished decisions. For example, in three unpublished decisions, the Eleventh Circuit has concluded that *Washington* required the suppression of evidence obtained through a bus passenger's consent, even though each of those cases involved one-on-one interactions between the officers and the passengers and, unlike in *Washington*, the officers did not make a general announcement from the front of the bus. See Gov't C.A. Pet. for Reh'g En Banc at 2-3 & Attach. B, C, and D (copies of decisions). Given the recurring nature of these fact patterns, the issue is of continuing importance.

ruling, if left intact, poses a direct threat to the continued efficacy of this law enforcement technique.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2001

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Nos. 99-13814, 99-15152

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

CHRISTOPHER DRAYTON & CLIFTON BROWN, JR.,
DEFENDANTS-APPELLANTS

Oct. 24, 2000

OPINION

Before CARNES and BARKETT, Circuit Judges, and POLLAK*, District Judge.

CARNES, Circuit Judge:

This is another in a series of cases involving warrantless searches of bus passengers. *See generally United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998); *United States v. Guapi*, 144 F.3d 1393 (11th Cir. 1998). As a result of the searches involved in this case Christopher Drayton and Clifton Brown, Jr. were each convicted of conspiring to distribute cocaine and

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* Honorable Louis H. Pollak, U.S. District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

possessing cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. They appeal, contending that the district court erred in denying their motions to suppress the cocaine found in the search of their persons.[1]

The only issue before this Court is, as we put it in *Washington*, 151 F.3d at 1355, whether the consent given by each defendant for the search was "uncoerced and legally voluntary" under the Fourth Amendment. Because the facts of this case are not distinguishable in a meaningful way from those in *Washington*, we are compelled by that decision to hold that these defendants' consent was not sufficiently free of coercion to serve as a valid basis for a search.[2]

I. FACTUAL BACKGROUND

On February 4, 1999, a bus containing about 25 to 30 passengers en route from Ft. Lauderdale to Detroit made a scheduled stop at a Greyhound bus station in

[1] Drayton and Brown were convicted and appealed separately, but we have consolidated their appeals because the facts, which were developed at a joint hearing on their motions to suppress, are identical.

[2] The *Washington* decision has been criticized by the Tenth Circuit, which has declined to follow it. *See United States v. Broomfield*, 201 F.3d 1270, 1275 (10th Cir. 2000) (characterizing *Washington* as, in effect, having "creat[ed] a per se rule that authorities must notify bus passengers of the right to refuse consent before questioning those passengers and asking for consent to search luggage," which "renders the soundness of the *Washington* opinion questionable"); *accord Washington*, 151 F.3d at 1358 (Black, J., dissenting). We do not have any occasion to pass on that criticism, and express no view concerning it, because we are bound by the prior panel decision in *Washington* in any event. *Wascura v. Carver*, 169 F.3d 683, 687 (11th Cir. 1999).

downtown Tallahassee, Florida. During the stop, all of the passengers were required to exit the bus temporarily for reasons unrelated to law enforcement. As the passengers re-boarded, the driver checked their tickets before leaving to handle paperwork in the bus terminal office. Before the driver left for the terminal office, three members of the Tallahassee Police Department received permission from him for them to board the bus while the passengers were seated and waiting to depart. The officers were dressed casually and their badges were either hanging around their necks or held in their hands. They wore their guns in side-holsters, which were covered by either a shirt or jacket. There is no evidence to indicate that any passenger ever saw that the officers were armed.

Once on board the bus the officers did not make any general announcements to the passengers nor did they hold up their badges for all of the passengers to see. Officers Lang and Blackburn made their way to the back of the bus, while Officer Hoover knelt in the bus driver's seat, facing toward the rear of the bus in order to observe the passengers and ensure the safety of the other officers. In that position, Hoover could see the passengers and they could see him.

Officers Lang and Blackburn went to the back of the bus and started working their way forward, asking passengers where they were traveling from, and attempting to match passengers to the luggage in the overhead rack. The officers did not block the aisle, but instead stood next to or behind the passengers with whom they were talking. According to Lang's testimony, passengers who declined to have their luggage searched or who wished to exit the bus at any time

would have been permitted to do so without argument.[3] In similar bus searches conducted by Lang over the past year, five to seven passengers declined to have their luggage searched, and an unspecified number of other passengers exited the bus during the searches.

Defendants Drayton and Brown were seated next to each other a few rows from the rear of the bus on the driver's side, with Drayton in the aisle seat and Brown next to the window. After examining the rear of the bus, Lang approached the defendants from behind and leaned over Drayton's shoulder. He held up his badge long enough for the defendants to see that he was a police officer and, with his face 12-18 inches away from Drayton's face, Lang spoke in a voice just loud enough for the defendants to hear. He told them:

> I'm Investigator Lang with the Tallahassee Police Department. We're conducting bus interdiction, attempting to deter drugs and illegal weapons being transported on the bus. Do you have any bags on the bus?

Both of the defendants responded by pointing to a green bag in the overhead luggage rack. Lang asked, "Do you mind if I check it?," to which Brown responded, "Go ahead." Lang handed the bag to Officer Blackburn to check. He did check it, and no contraband was found in the bag.

Officer Lang had noticed that both defendants were wearing heavy jackets and baggy pants despite the fact that it was a warm day, and he thought that they were

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[3] Officer Lang was the only witness to testify at the joint hearing on the defendants' motions to suppress.

overly cooperative during the search. So Lang requested and received permission from Brown to conduct a pat-down search of his person for weapons. Brown leaned up in his seat, pulled a cell phone out of his pocket, and opened up his jacket. Lang then reached across Drayton and patted down Brown's jacket and pockets, including his waist area, sides, and upper thighs. In both thigh areas, Lang detected hard objects which were inconsistent with human anatomy but similar to drug packages he had found on other occasions. Lang arrested and handcuffed Brown, and Officer Hoover escorted Brown off the bus.

Lang next turned to Drayton and asked, "Mind if I check you?" Drayton responded by lifting his hands approximately eight inches off of his legs. Lang conducted a similar pat-down of Drayton's thighs. When Lang detected hard objects on Drayton's thighs similar to those he had felt on Brown, Drayton was arrested and escorted off the bus.

Once the defendants were off the bus, Lang unbuttoned their trousers and found plastic bundles of powder cocaine duct-taped between several pairs of boxer shorts. Drayton had two bundles containing 295 grams of cocaine, and Brown had three bundles containing 483 grams of cocaine.

II. DISCUSSION

This case is controlled by our decision in *United States v. Washington*, 151 F.3d 1354 (11th Cir. 1998), which extended *United States v. Guapi*, 144 F.3d 1393

(11th Cir. 1998).[4] In *Washington*, federal agents searched passengers on a bus after it had made a scheduled stop. *See* 151 F.3d at 1355. The search revealed cocaine concealed in the pants of one of the passengers. *See id.* at 1356. Concluding that the facts and circumstances surrounding the search indicated that "a reasonable person . . . would not have felt free to disregard [the agents'] requests without some positive indication that consent could have been refused," this Court held that the search violated the Fourth Amendment's prohibition against unreasonable searches and seizures. *See id.* at 1357.

We do not believe that any of the factual differences between this case and *Washington* are material. One factual difference is that the officers in this case spoke to the passengers only individually, unlike in *Washington* where an officer stood up in front of the bus, with his badge held over his head, and announced to all of the passengers that the agents were about to conduct a routine bus check. *See id.* at 1355; *Guapi*, 144 F.3d at 1394 (reciting police officer's announcement to the whole bus). The government argues that the lack of a "show of authority" in the form of an announcement to all the passengers distinguishes this case from *Washington*.

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[4] Our holding is consistent with *United States v. Hill*, 228 F.3d 414 (11th Cir., July 24, 2000) (unpublished opinion), a case that is factually indistinguishable from this one, which concluded that *Washington* compels a suppression of the evidence given these facts. Although *Hill* is an unpublished opinion and therefore not binding precedent, we do find its analysis of *Washington's* application persuasive. *See* 11th Cir. R. 36-2.

We disagree. Although there was no general show of authority at the front of the bus in this case, there was a specific show of authority passenger-by-passenger. Officer Lang approached the defendants with his badge held up in his hand, leaned over with his face 12-18 inches from Drayton's, and told the defendants that he was conducting a bus interdiction, looking for drugs and illegal weapons. We do not believe that a passenger-specific show of authority is any less coercive than a general bus-wide one.[5] Moreover, the general announcement made by the agent in *Washington* included the statement that, "No one is under arrest or anything like that, we're just conducting a routine bus check." 151 F.3d at 1355. There was no such reassurance in this case.

Another difference between *Washington* and this case is that Officer Lang did not have the defendants display their tickets or photo identification before he conducted the search. *See id.* at 1355-56. Apparently, the reason the officers in *Washington* asked to see tickets and identification was to look for suspicious circumstances, but we do not see how the failure to ask for such documents affects whether other requests or commands are coercive. *See Guapi*, 144 F.3d at 1393-94, 1397 (finding bus search coercive even though officers did not request defendant's ticket or identification).

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[5] In *Guapi*, the Court stated that when officers individually approach passengers and communicate an intention to conduct a search, instead of making a general announcement, there is "no reason to believe . . . that they are coercing or intimidating citizens." 144 F.3d at 1396. Those were not the facts in *Guapi*, however, so the statement is only dicta, and we are not persuaded by it.

A third difference involves the record relating to instances in which Officer Lang had searched other buses. Lang testified that during the past year five to seven people had declined to have their luggage searched, and that passengers had often exited the bus while the officers were on it. If there was any similar information in the record in *Washington*, the opinion does not indicate it. Nonetheless, the existence of that information in this case fails to distinguish it from *Washington*. Officer Lang did not testify that the statements the officers made and the methods they used in the searches where passengers declined to give consent or exited the bus were the same as in this case. *See also Guapi*, 144 F.3d at 1396 (although the officer could recall several times where passengers had previously refused his search requests, "It is undisputed that in the instant circumstances no passengers refused the search"). Not only that, but according to Lang's testimony, he had searched approximately eight hundred buses in the past year. Even if Lang spoke with only three or four passengers per bus, six or seven refusals out of hundreds of requests is not very many.[6]

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[6] The government also argues that this case is distinguishable from *Washington* due to the background and experience of the defendants. The government points out that Drayton was 26 years old, was employed for six of the previous eight years, and had experience with law enforcement in connection with previous drug charges, and that Brown was 29 years old and had previously been employed for three years as a correctional officer. However, we reject that purported distinction, because the test is an objective one. *See Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 2388, 115 L.Ed.2d 389 (1991) ("whether a reasonable person would have felt free to decline the officers' requests"); *Washington*, 151 F.3d at 1357.

One final factual difference between this case and *Washington* actually cuts in the defendants' favor. Here, after the three officers boarded the bus, one of them remained at the front, kneeling in the bus driver's seat in view of the passengers. Seeing an officer stationed at the bus exit during a police interdiction might make a reasonable person feel less free to leave the bus. *See United States v. Hill*, 228 F.3d 414 (11th Cir., July 24, 2000) (unpublished opinion) ("The presence of an officer at the exit, even if not so intended, is an implication to passengers that the searches are mandatory."); *Washington*, 151 F.3d at 1358 (Black, J., dissenting) (emphasizing absence of officer at front of bus in that case); *see also Guapi*, 144 F.3d at 1396 (noting that the exit was blocked by police officers).

III. CONCLUSION

For the reasons we have explained, we conclude that the outcome of this case is controlled by our decision in *Washington*, which requires that we reverse the convictions of these two defendants and remand with instructions that the district court grant their motions to suppress.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

Case No. 4:99cr15-WS

THE UNITED STATES OF AMERICA, PLAINTIFF

vs.

CHRISTOPHER DRAYTON AND CLIFTON BROWN,
DEFENDANTS

March 16, 1999

TRANSCRIPT OF HEARING
ON MOTION TO SUPPRESS BEFORE THE
HONORABLE WILLIAM STAFFORD
SENIOR UNITED STATES DISTRICT JUDGE

* * * * *

[104] THE COURT: All right. In this case I find that there was no violation of the defendant's constitutional rights, and that the police conduct was not coercive and that the search was therefore voluntary on the part of the Defendants Brown and Drayton. And I base that upon my consideration of the totality of the circumstances, and of course having heard the only witness in this case testify.

I don't think the facts are much in dispute. It's very clear that the bus was traveling from south to north through Tallahassee going somewhere either north or west, perhaps both, out of Tallahassee. This was a stop along the way. The passengers were required to exit the bus by the bus company. And then after the passengers got back on board—that is those who were continuing on their travels and those who were boarding new in Tallahassee boarded—then the three officers, Mr. Lang, Mr. Hoover and Mr. Blackburn, boarded the bus.

Again, Hoover apparently at the front, then kneeling, as I guess I can—on his knees, in the driver's seat, looking aft, to check and make sure that there was no threat to the officers whose backs were turned. Mr. Blackburn goes to the back of the bus and—to check the restroom and the passenger on that rear bench seat.

Mr. Lang, who testified, starts working the bus from the back forward. In the—I guess what might be the first full row of seats, the defendants, Mr. Brown and Mr. Drayton, were [105] seated. The badge was either pulled out from his chain around his neck or handed to him by Mr. Lang. He was walking forward and leaning over from the rear of the passengers, rather than standing in the aisle blocking their way.

There was no general announcement when these officers got on the bus. There was no brandishing of the badges by these officers when they boarded the bus. They came on and they could have or could not have been—and I don't think it makes any difference—but easily could have been distinguished or indistinguishable from other passengers who may have boarded late. But whatever, they were the last ones on the bus.

And as in Bostick, the people who were on that bus were on there because they wanted to be on that bus. They were going someplace from Tallahassee. It was not as if the police or the bus company herded them, did a sweep through the lobby of the terminal and put everybody on the bus and then let the police come on board and work the bus. These people were on because they wanted to be on the bus.

So if, as in the words of Florida against Bostick—the Supreme Court case, 501 U.S. 429, decided June 20, 1991—Mr. Brown and Mr. Drayton were in no different position than Bostick was, who was on that bus, and the bus was ready to leave. So we start from that premise. They were on that bus, they were in that confined location by their choice.

The officer—Investigator Lang did not tell him, and he [106] does not make that suggestion here, nor does the government, that he was required—he does not tell them that they don't have to consent.

And I think that's what Bostick says, at least that's what the Court of Appeals of the Eleventh Circuit, Judge Roney, who wrote both of these opinions for the majority, says: "Although we reject the notion of a per se rule requiring bus passengers to be informed of their constitutional rights"—and then it goes on [to] say, we have to—except for the use of the word "police officers" in Guapi, and the use of the word "federal agents" in Washington, that paragraph of Judge Roney's opinion is identical. It contains the same language. It came out of the same word processor, and well it should because that's how—that's, I guess, a correct statement of the law.

And so we are then—whatever we may think about that rubric, whatever we may think that it might be easier on these cases if the police had taken the three to five seconds say, "Now of course you folks don't have to consent, it's entirely up to you," there's nothing in the law that says they have to do that. So we look at the totality of the circumstances.

This is an officer who approaches these men from the back. There is no one standing in their way. He is coming to them from their rear. He leans over—and it's obvious that they can get up and leave, as can the people ahead of them. If his speech is as it was on the stand, there is nothing in his tone [107] of voice that suggests that this is some abusive bully type individual. He is a black or African American man talking to two other black—black or African American men on this bus. He leans forward, and either from his chest chain or from his wallet shows them his badge and explains to them that he wants to—as his testimony was, that he's concerned about drugs and firearms.

Any everything that's said, everything that took place between Officer Lang and Mr. Drayton and Mr. Brown suggests that it was cooperative. There was nothing coercive, there was nothing confrontational about it. There is no evidence that there was somebody then standing in the aisle and say, you know, come if you want to.

And so none of the circumstances that existed in Guapi, G-U-A-P-I, U.S. against Guapi, 144 F.3d 1393, decided by the Eleventh Circuit on June 29, 1998—that's 144 F.3d 1393—nor in U.S. against Washington, decided by the same Eleventh Circuit, 151 F.3d 1354—that's 151 F.3d 1354—decided by the Court of Appeals on

August 28th, 1990, nothing in either—this case is unlike both of those cases.

Here there was no general announcement. Here there was nobody s..nding at the front of the bus. Here the passengers were already on, ready to leave. There was nothing coercive and nothing in what Officer Lang said or did or the other officers did on that bus that would suggest to a reasonable person that [108] they were not free to leave.

And so they're handing over their luggage, their on-board luggage. Their consent to the pat down leads me, as I've indicated, to believe that there was no violation of their constitutional rights. They consented to this search. I find that the government has met its burden on this case. I think that the government's response on Pages 16 and 17 fairly well sets forth the facts and the law that applies to the facts in this case.

Therefore, the evidence was lawfully seized by the police, and therefore the—and would be admitted in a trial of this case. And the motion to suppress is denied as to both defendants. And if upon reflection I need to put anything more on the record concerning my basis for this, I would allow myself to do so, but I think I've fairly well stated the basis for my decision.

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-13814 & 99-15152

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

versus

CHRISTOPHER DRAYTON & CLIFTON BROWN, JR.,
DEFENDANTS-APPELLANTS

[Filed: May 16, 2001]

On Appeal from the United States District Court for the Northern District of Florida

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ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC (opinion _____, 11th Cir., 19___, ____F.2d____).

Before CARNES and BARKETT, Circuit Judges, and POLLAK*, District Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active-service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules

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* Honorable Louis H. Pollak, U.S. District Court Judge for the Eastern District of Pennsylvania, sitting by designation.

of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ ED CARNES

UNITED STATES CIRCUIT JUDGE